Supreme Court, U.S.
F I L E D
MAY 28 1992
OFFICE OF THE CLERK

No. 91-1730

In The
Supreme Court of the United States
October Term, 1991

PETER D. PERFETTI,

Petitioner,

vs.

THE FIRST NATIONAL BANK OF CHICAGO,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

*HUBERT O. THOMPSON
CARNEY & BROTHERS, LTD.
30 N. LaSalle Street
Suite 3100
Chicago, IL 60602
(312) 372-2909

LYNN A. GOLDSTEIN
THE FIRST NATIONAL
BANK OF CHICAGO
One First National Plaza
11th Floor
Chicago, IL 60670
(312) 732-6919

Attorneys for Respondent

* *Counsel of Record*

ARMI®
Legal Copies of America (312) 332-2764

QUESTIONS PRESENTED FOR REVIEW

1. Where a plaintiff has demonstrated a prima facie case of age discrimination, may a Court of Appeals reverse a trial court's denial of a motion for judgment notwithstanding the verdict, where the defendant's proffered legitimate, non-discriminatory reason for its hiring decision is its assessment that another candidate had better interpersonal skills than the plaintiff, which assessment is not supported by objective evidence?

2. Did the Court of Appeals violate petitioner's Seventh Amendment rights in reversing the trial court's denial of a motion for judgment notwithstanding the verdict on the grounds that the evidence supporting the verdict was insubstantial?

RULE 29.1 STATEMENT

The parent company of The First National Bank of Chicago is First Chicago Corporation. Subsidiaries of the First National Bank of Chicago that are not wholly owned are Dearborn Park Corporation and Resort Holding Corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW . . . i

RULE 29.1 STATEMENT ii

TABLE OF AUTHORITIES iv

JURISDICTION 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT . . . 12

I. THE PETITION SHOULD BE DENIED BECAUSE THE SEVENTH CIRCUIT'S OPINION IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISION IN TEXAS DEPARTMENT OF COMMUNITY AFFAIRS V. BURDINE. 12

II. THE PETITION SHOULD BE DENIED BECAUSE THE SEVENTH CIRCUIT'S OPINION DOES NOT VIOLATE THE SEVENTH AMENDMENT RIGHT TO TRIAL BY JURY. . 19

CONCLUSION 25

TABLE OF AUTHORITIES

Cases: **Page(s)**

Braxton v. United States, ___ U.S.____, 111 S.Ct. 1854 (1991) 13

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) . . . 13,15,16, 17, 18

Board of Trustees of Keene St. Col. v. Sweeney, 439 U.S. 25 (1978) 16,18

Pollard v. Rea Magnet Wire Co., Inc., 824 F.2d 557, (7th Cir.), cert. denied. 484 U.S. 477 (1987) 18

Baltimore & Carolina Line v. Redman, 295 U.S. 654, (1934) . . . 19

Galloway v. United States, 319 U.S. 372 (1943) 19, 24

Rule:

Sup.Ct. Rule 10 12

Statute:

ADEA, 29 U.S.C. §621 et seq. . . . 12

No. 91-1730

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

PETER D. PERFETTI,
Petitioner,

v.

THE FIRST NATIONAL
BANK OF CHICAGO,
Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition. However, as treated more fully by the argument contained herein, respondent does not believe petitioner has shown any reason

for this Court to exercise its sound judicial discretion to grant the petition.

STATEMENT OF THE CASE

The petitioner worked at The First National Bank of Chicago ("First Chicago") from 1971 to 1986 in a variety of positions involving analysis of operations and methods designed to increase profitability and control costs. His last position at First Chicago was as an Operations Analyst I in the Operations Analysis Group. In September 1986, the entire Operations Analysis Group was disbanded due to a reduction in force ("RIF"). Thereafter, petitioner applied for five different positions at First Chicago. He was not hired for any of them.

Pursuant to First Chicago's RIF policies, petitioner was placed on salary continuation for five months after the Operations Analysis Group was disbanded. The purpose of salary continuation is to

provide the employee with time to look for a new job. During salary continuation, petitioner was allowed to bid on open positions within First Chicago and was considered an internal candidate. In addition to allowing employees to bid internally for jobs, First Chicago provides use of the Career Counseling Center to employees after a RIF. The Center provides secretarial and out placement services, including counseling about job searches and interviewing techniques.

Nancy Seever, who managed the Center for First Chicago, worked with petitioner in the Center while he was looking for a job. Her impression of petitioner at the time was that he thought First Chicago owed him a job, he was acting like a jerk and he had an attitude problem. Robert Chapman, a First Chicago recruiter, concurred that during this time petitioner came across as angry and hostile.

On November 13, 1986, while still on salary continuation, petitioner applied for an Operations Analyst I position in the Retail Banking Services Group of the Consumer Bank Group. Although this job had the same title as petitioner's last job at First Chicago, it was in a different division. The environment within which this new position would be performed was not the same as the environment within which petitioner had previously functioned. The new position required working with the same operations people day after day, rather than doing a consulting job in one area of the bank and then leaving.

Because of the nature of the job and the group of individuals involved, the hiring manager, Maria McSweeney, determined that strong interpersonal skills were very important for success in this position. This was reflected on the job posting form. Chapman, the recruiter for the job, reviewed

petitioner's bid sheet and resume and determined he was at least minimally qualified for the job. Chapman also reviewed the qualifications of another candidate, Rose Carter. Chapman thought that Carter's overall package of qualifications was stronger than petitioner's for this particular position. Carter's educational background was much stronger than petitioner's -- she had a masters degree in management and petitioner had an associates degree in industrial electronics and electric power. In addition, petitioner's interpersonal skills were not nearly as well-developed as Carter's. At the time, petitioner was angry and hostile and came across as somewhat egocentric, which hampered his interpersonal skills. Carter's interpersonal skills were very strong and well-developed and she communicated effectively. Although Chapman thought Carter was a stronger candidate, he

referred both candidates to McSweeney without indicating any personal preferences.

McSweeney interviewed about six people for the position, including petitioner and Carter. McSweeney believed that each candidate comes as a whole package which includes skill, experience and education. She concluded after a one hour interview that petitioner's "package" was not what she was looking for because he lacked the interpersonal and communication skills that were needed for this position.

McSweeney testified that during the interview she observed petitioner's communication skills and demeanor and noticed several problems with his interpersonal skills. Petitioner frequently tried to pressure her and at times his communication was inappropriate for an interview. McSweeney concluded if his communication and interpersonal skills were not appropriate during an interview when a

person was trying to do his best, there was no indication the appropriate skills would be there in a consulting situation.

McSweeney also testified that petitioner related an incident in which he had told a First Chicago vice president that he was right about how to conduct a particular project and that the vice president was wrong. Petitioner denied making this statement. However, petitioner did tell Nancy Seever after his interview with McSweeney that he had told McSweeney that he would do things his way rather than McSweeney's if they disagreed. Carter, on the other hand, made a good impression on McSweeney during the interview -- she was personable and effervescent and demonstrated good communication skills. McSweeney felt Carter was the kind of person you could send into a tricky situation and she would do well. McSweeney decided that Carter was a better candidate than petitioner and hired

her. McSweeney's notes at the time reflect that she decided not to hire petitioner because "other candidates had skill/experience/education 'packages' that might be preferable." Chapman called petitioner and told him he did not get the job because they found someone more suitable.

On March 5, 1987, after he was off the First Chicago payroll and no longer considered an internal candidate, petitioner applied for a Facilities Coordinator I position. First Chicago's hiring policies require that all internal candidates must be considered and eliminated before any external candidates can be considered.

The job was posted internally from March 4-10, 1987. Bob Chapman received petitioner's resume as an application for the job on March 5, 1987. On March 10, 1987, Ray Altmann, the hiring manager, told Chapman that he had offered the Facilities

Coordinator I position to an internal candidate, Tom Jarecki. Chapman, therefore, did not tell Altmann about petitioner's application. Chapman called petitioner and told him an internal candidate had been hired for the job.

Altmann offered the position to Jarecki because Jarecki had been working on starting up the mortgage processing business and had experience in the area. Jarecki took the job and performed it for a short period of time and then became frustrated and went back to his former position. Altmann never got around to processing the paper work for the promotion Jarecki should have received by taking the position. After Jarecki left the position, Altmann merged the responsibilities of the Facilities Coordinator I position with those of another First Chicago employee, Terry Soderberg.

On October 13, 1988, petitioner filed this action in the United States District

Court for the Northern District of Illinois. He alleged that First Chicago discriminated against him on the basis of age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621 et seq., because it failed to hire him for any of the positions for which he applied after the RIF and because it failed to promote him prior to the RIF. Petitioner did not challenge the RIF decision itself.

On November 17, 1989, the trial court granted First Chicago's motion for summary judgment with respect to Counts 1, 3, 4 and 6 of the Complaint. Counts 2 and 5 of the Complaint alleging the First Chicago failed to hire petitioner for the Operations Analyst I and the Facilities Coordinator I positions, proceeded to trial before a jury on January 12, 1990.

First Chicago moved for a directed verdict on both counts of the Complaint at the close of plaintiff's case. The trial

court took the motion under advisement. First Chicago renewed its motion for directed verdict at the close of its case and at the close of all of the evidence. The trial court never ruled on the motion.

On January 22, 1990, the jury returned a verdict that age was a determining factor in the decision not to hire petitioner for both positions. The jury also found that the hiring decisions were made in willful violation of the ADEA. The jury determined that petitioner was entitled to $64,900 in back pay and $89,700 in front pay. First Chicago moved for judgment notwithstanding the verdict on February 12, 1990. The District Court denied First Chicago's motion on September 17, 1990. The District Court also denied petitioner's request for reinstatement and awarded front pay in the amount determined by the jury.

On November 28, 1990, the District Court entered an order doubling petitioner's

back pay award to $129,800, awarding front pay of $89,700 and attorneys' fees in the amount of $59,550. The Court awarded costs to First Chicago in the amount of $2,881.50 and to petitioner in the amount of $11,564.30.

On December 27, 1990, First Chicago filed its Notice of Appeal to the Seventh Circuit. The Seventh Circuit reversed the denial of the motion for judgment notwithstanding the verdict and remanded for entry of judgment in favor of First Chicago.

REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED BECAUSE THE SEVENTH CIRCUIT'S OPINION IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISION IN TEXAS DEPARTMENT OF COMMUNITY AFFAIRS V. BURDINE.

The issuance of a writ of certiorari is not a matter of right but a matter of this Court's discretion. Sup. Ct. Rule 10. The principal purpose for which this Court uses certiorari jurisdiction is to resolve

conflicts among Circuit Courts of Appeal and state courts concerning the meaning of provisions of federal law. Braxton v. United States, ___ U.S.___, 111 S.Ct. 1854 (1991). Here, the petitioner has not alleged that there is a conflict in decisions among the Circuits. Rather, the petitioner claims that the decision by the Seventh Circuit reversing the denial of First Chicago's motion for judgment notwithstanding the verdict conflicts with this Court's decision in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Petitioner relies on Burdine for the proposition that the employer must be required to present objective evidence to support its assessment that another candidate had better interpersonal skills than the petitioner. Burdine expressly rejects such a requirement.

In this case, Maria McSweeney, a hiring manager for First Chicago, interviewed

several candidates for the position of Operations Analyst I; among them were the petitioner and Rose Carter. Both of these candidates met the minimum qualifications for the position[1]. After an approximately one hour interview with each of these candidates, Ms. McSweeney chose Rose Carter for the position because Ms. McSweeney concluded that Ms. Carter had stronger interpersonal skills than petitioner.

Petitioner urges this Court to hold that when an employer is faced with a choice

---

[1] The qualifications for the Operations Analyst I position were as follows:

> 3-6 yrs. consulting and/or related operations management experience necessary. Previous project management essential (knowledge of methods, analysis, work measurement etc.) Strong interpersonal skills as well as analytical capabilities and an ability to work independently are required to function successfully in this position.

(Emphasis added.)

between a person who is not in the protected class and a person who is, the employer must select the person in the protected class unless the employer can prove by objective criteria that the person not in the protected class is better qualified. Petitioner is in error.

In Burdine, the plaintiff brought an action against the Texas Department of Community Affairs ("TDCA") alleging sex discrimination in TDCA's firing plaintiff and hiring a male for the position of Project Director, a position for which the plaintiff had applied. The district court found no evidence of discrimination in the decision not to promote and to terminate the plaintiff and entered judgment for the defendant. The Fifth Circuit reversed holding that the defendant had the burden of proving by objective evidence that those hired or promoted were better qualified than the plaintiff. Burdine, 450 U.S. at 252.

The Burdine Court rejected the Fifth Circuit's "objective evidence" standard, holding as follows:

> The Court of Appeals also erred in requiring the defendant to prove by objective evidence that the person hired or promoted was more qualified than the plaintiff. McDonnell Douglas teaches that it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally. The Court of Appeals' rule would require the employer to show that the plaintiff's objective qualifications were inferior to those of the person selected. If it cannot, a court would, in effect, conclude that it has discriminated.

Burdine, 450 U.S. at 258. Thus, the argument that First Chicago be required to prove that Rose Carter was more qualified than the petitioner was specifically rejected by the Burdine Court. See also Board of Trustees of Keene St. Col. v. Sweeney, 439 U.S. 25 (1978). Such a requirement would eliminate the use of personal interviews in the hiring process.

Yet, the ADEA, like Title VII, was not intended to "diminish traditional management prerogatives." Burdine, 450 U.S. at 259. The Burdine Court rejected the notion that an employer must hire the person in the protected class whenever that person's objective qualifications are equal to those of a white male applicant. "Rather, the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria." Burdine, 450 U.S. at 259.

In the present case, First Chicago chose between two candidates, both of whom met the minimum qualifications for the position of Operations Analyst. This Court has consistently held that the employer is not constrained to hire a member of the protected class whenever that person has the minimal qualifications for the position. Nor is the employer required to prove that its decision in selecting a person not

within the protected class was based upon objective criteria, since such a rule would diminish traditional management prerogatives and would transfer to the employer a burden of persuasion that is properly the plaintiff's. Burdine, 450 U.S. at 257; Sweeney, 439 U.S. at 25. Even if Ms. McSweeney mistakenly concluded that Rose Carter had better interpersonal skills than the petitioner, such a mistake would not constitute pretext. Pollard v. Rea Magnet Wire Co., Inc., 824 F.2d 557, 559 (7th Cir.), cert. denied, 484 U.S. 977 (1987).

Far from conflicting with this Court's decision in Burdine, the Seventh Circuit decision below is entirely consistent with this Court's precedents. There is no basis for granting the petition for a writ of certiorari on this issue.

II. THE PETITION SHOULD BE DENIED BECAUSE THE SEVENTH CIRCUIT'S OPINION DOES NOT VIOLATE THE SEVENTH AMENDMENT RIGHT TO TRIAL BY JURY.

The petitioner alleges that the Court of Appeals violated his Seventh Amendment rights by imposing its inferences and conclusions as to the conflicting evidence in reversing the jury verdict. Pet. at 33. Petitioner's argument apparently does not challenge generally the power of federal courts to grant judgment notwithstanding the verdict where the evidence is insufficient to sustain a verdict[2]. However, petitioner claims that in weighing the conflicting evidence in this case, the Seventh Circuit

---

[2]The federal courts have long held that the purpose of the Seventh Amendment is to preserve the common law distinction between the province of the court and that of the jury, whereby issues of law are to be resolved by the court and issues of fact are to be determined by the jury. Whether the evidence is sufficient is a question of law to be resolved by the court. Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657-658 (1934); Galloway v. United States, 319 U.S. 372 (1943).

rejected proper inferences drawn by the jury and substituted its own. Petitioner's argument is without merit.

The fallacy of petitioner's argument begins with the premise that there was conflicting evidence concerning any of the material facts. With one exception, there was no dispute as to any fact that was material to a determination of the merits as to either of the two jobs at issue.

As to the Operations Analyst I job, there was no dispute that Ms. McSweeney interviewed about six candidates for the position; that both Rose Carter and the petitioner met the minimum qualifications for the job; that strong interpersonal skills was an important qualification for the position; that Ms. McSweeney concluded that Rose Carter had strong interpersonal skills and that the petitioner had poor interpersonal skills; that Robert Chapman, a recruiter for First Chicago, and Nancy

Seever, the manager of First Chicago's Career Counseling Center, concurred that at that time, the petitioner had the attitude that First Chicago owed him a job, was acting like a jerk and was angry and hostile. There was also no dispute that two of petitioner's former co-workers believed that petitioner had strong interpersonal skills, but that they did not communicate their impressions to Ms. McSweeney.

The only fact in dispute concerning the Operations Analyst I position was whether petitioner related a particular incident to Ms. McSweeney in which he had told a First Chicago vice president that petitioner was right about how to conduct a particular project and that the vice president was wrong. The Seventh Circuit correctly resolved this factual dispute in favor of petitioner. However, even excluding the evidence concerning the statement to the

vice president, there was insufficient evidence to sustain a jury verdict.

The testimony of Robert Chapman and Nancy Seever concerning petitioner's attitude at the time of his interview was unrebutted, as was the testimony of Ms. McSweeney that her assessment of petitioner's interpersonal skills was not based on this one incident but on the entire hour long interview. Furthermore, the testimony of petitioner's co-workers concerning his interpersonal skills did not conflict with Ms. McSweeney's assessment that Rose Carter's interpersonal skills were stronger than petitioner's.

Similarly, as to the Facilities Coordinator I position, there were no material facts in dispute. The evidence is undisputed that at the time of the posting for the position, petitioner was no longer an employee of First Chicago and was considered an external candidate; First

Chicago's policy does not allow hiring managers to consider external candidates, such as petitioner, until all internal candidates have been considered and eliminated; at the end of the posting period, Ray Altmann, the hiring manager, informed the recruiter, Mr. Chapman, that he had offered the position to Tom Jarecki, an internal candidate. Accordingly, Mr. Chapman never told Mr. Altmann that petitioner had submitted an application for the job. The evidence is also undisputed that Jarecki remained in the position only a short time, became dissatisfied and returned to his prior position. Afterwards, the functions of the position were assigned to another current employee of First Chicago, and no other person was hired.

Petitioner alleges that the jury should have been allowed to draw inferences that the hiring of Jarecki was a "flim-flam" perpetuated solely to deprive petitioner of

the position. Petitioner relies heavily on the fact that First Chicago produced the documentary evidence reflecting the hiring of Jarecki after the close of discovery. The Seventh Circuit correctly found that no reasonable jury could have disbelieved all of First Chicago's evidence. Furthermore, there was absolutely no evidence that the documents were fabricated. And while the jury may be allowed to draw reasonable inferences from the evidence, it cannot be allowed to speculate in the absence of evidence. Galloway v. United States, 319 U.S. at 395.

Petitioner's claim that the Court of Appeals violated his Seventh Amendment rights by supplanting the jury's permissible inferences with its own is not supported by the evidence. The Court of Appeals determined that the evidence supporting plaintiff's age discrimination claims was insufficient as a matter of law to sustain

the jury verdict. Such a determination is wholly consistent with the dictates of the Seventh Amendment. The Seventh Circuit did not improperly reweigh the evidence or impose its inferences on the evidence in derogation of the jury function.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

FIRST NATIONAL BANK OF CHICAGO

*Hubert O. Thompson
CARNEY & BROTHERS, LTD.
30 North LaSalle Street
Suite 3100
Chicago, Illinois 60602
(312)372-2909

Lynn A. Goldstein
The First National Bank
of Chicago
One First National Plaza
11th Floor
Chicago, IL 60670
(312) 732-6919

Attorneys for Respondent
*Counsel of Record